

FIRST NOTICE OF COMMENT PERIOD

LSA Document #14-254

RESTRICTIVE COVENANTS

PURPOSE OF NOTICE

The Indiana Department of Environmental Management (IDEM) is soliciting public comment on amendments to [329 IAC 1](#) concerning requests for restrictive covenant modifications and associated cost recovery measures for remediation projects described in [IC 13-23](#), [IC 13-24](#), [IC 13-25-4](#), and [IC 13-25-5](#). IDEM seeks comment on the affected citations listed and any other provisions of Title 329 that may be affected by this rulemaking.

CITATIONS AFFECTED: [329 IAC 1](#).

AUTHORITY: [IC 4-22-2](#); [IC 13-14-9](#).

SUBJECT MATTER AND BASIC PURPOSE OF RULEMAKING

Basic Purpose and Background

A restrictive covenant, often referred to as an environmental restrictive covenant or ERC, may be used as the remedy or part of the remedy for remediation of contaminated land. A restrictive covenant, defined in [IC 13-11-2-193.5](#), limits the use of the land or the activities that may be performed on or at the land, or requires the maintenance of any engineering control on the land that is designed to protect human health or the environment. A restrictive covenant runs with the land, it binds successors and it is recorded with the county recorder's office in the county in which the land is located. [IC 13-11-2-193.5](#) requires an explanation within the restrictive covenant for modification or termination. A restrictive covenant is used in remediation projects that deal with cleanup of the following:

- A release from an underground storage tank, as described in [IC 13-23](#);
- A release of petroleum at a petroleum facility, as described in [IC 13-24](#);
- A site that is or was listed on the comprehensive environmental response, compensation and liability information system (CERCLIS), in accordance with section 116 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9616, as described in [IC 13-25-4](#); and
- A release or threatened release of a hazardous substance or petroleum that is handled voluntarily under the Voluntary Remediation (VRP), as described in [IC 13-25-5](#).

As of April 2014, there are over 1,300 remediation sites in Indiana with a restrictive covenant. Modification requests for a portion of these restrictive covenants have been made. A modification of a restrictive covenant may be needed for a variety of reasons, including a change in site conditions or proposed use, property subdivision, or an advancement in science and technology. Before the commissioner of IDEM may authorize a subsequent recording, IDEM must review the modification request and reassess the status of the site to ensure the change will not increase the potential hazards to human health or the environment. The review of a modification request has placed a burden on IDEM resources and staff. In response, the 2014 Indiana General Assembly passed legislation at Public Law (P.L.) 220-2014, SECTION 8 adding [IC 13-14-2-9](#) that provides guidance on how to request a modification of a restrictive covenant, when a modification should occur, and directs the Environmental Rules Board (ERB) to adopt rules providing for the recovery of administrative and personnel expenses incurred by the state in evaluating modifications of restrictive covenants. IDEM plans to set cost recovery measures for the evaluation of requests for modification of a restrictive covenant. For consistency, IDEM is considering the cost recovery measures used in related programs at IDEM, such as the voluntary remediation program (VRP). This could include using actual costs and accounting for IDEM staff hours worked using a fixed amount per hour. The hourly rate may be based upon and adjusted by the Midwest region urban zone consumer price index (CPI) obtained at <http://www.bls.gov/cpi/>. IDEM seeks comment on the affected citations listed, including suggestions for specific language, any other provisions of Title 329 that may be affected by this rulemaking, and alternative ways to achieve the purpose of the rulemaking.

Alternatives to Be Considered Within the Rulemaking

Alternative 1. Develop procedures for requesting a restrictive covenant modification and standards for when a restrictive covenant may be modified, and set cost recovery measures associated with evaluation of modification requests.

- Is this alternative an incorporation of federal standards, either by reference or full text incorporation? No.
- Is this alternative imposed by federal law or is there a comparable federal law? This alternative is not imposed by federal law and there is no comparable federal law. It is a "state- only" requirement under at P.L.220-2014, SECTION 8.
- If it is a federal requirement, is it different from federal law? Not applicable.

- If it is different, describe the differences. Not applicable.

Alternative 2. Not do a rulemaking.

- Is this alternative an incorporation of federal standards, either by reference or full text incorporation? No.
- Is this alternative imposed by federal law or is there a comparable federal law? This alternative is not imposed by federal law and there is no comparable federal law. P.L.220-2014, SECTION 8 requires the ERB to adopt rules for cost recovery measures.
- If it is a federal requirement, is it different from federal law? Not applicable.
- If it is different, describe the differences. Not applicable.

Applicable Federal Law

There are no applicable federal laws.

Potential Fiscal Impact

Potential Fiscal Impact of Alternative 1. This rule would impose a fiscal impact, as authorized through [IC 13-14-2-9](#), if a person requests a modification of a restrictive covenant from IDEM and IDEM then incurs administrative and personnel expenses. IDEM's administrative costs may be based on actual expenditures. IDEM plans to base personnel expenses on hours worked on the project. The hourly rate may be based upon and adjusted by the Midwest region urban zone consumer price index (CPI) obtained at <http://www.bls.gov/cpi/>. These expenses will vary from request to request. Only services rendered by IDEM will be required to be paid. Beyond the fiscal impact of cost recovery measures, this alternative would not impose any costs not already imposed through the authorizing legislation. P.L.220-2014, SECTION 8 requires the submission of certain materials before the commissioner may authorize the filing of a supplemental recording, such as a written request for the modification, a copy of the proposed modification of the restrictive covenant, and information indicating why the covenant should be modified. Preparing and providing these materials to IDEM will have an associated cost, this could include consultant fees, environmental sampling fees, or attorney fees; these will be the responsibility of the person who is requesting a modification.

Potential Fiscal Impact of Alternative 2. No fiscal impact not already imposed through the authorizing legislation would be imposed; however, not doing a rulemaking would leave state rules out of compliance with P.L.220-2014, SECTION 8.

Small Business Assistance Information

IDEM established a compliance and technical assistance program (CTAP) under [IC 13-28-3](#). The program provides assistance to small businesses and information regarding compliance with environmental regulations. In accordance with [IC 13-28-3](#) and [IC 13-28-5](#), there is a small business assistance program ombudsman to provide a point of contact for small businesses affected by environmental regulations. Information on the CTAP program, the monthly CTAP newsletter, and other resources available can be found at:

www.in.gov/idem/ctap

For purposes of [IC 4-22-2-28.1](#), small businesses affected by this rulemaking may contact the Small Business Regulatory Coordinator:

Jessica Faust-Hamblin
IDEM Small Business Regulatory Coordinator
IGCN 1225
100 North Senate Avenue
Indianapolis, IN 46204-2251
(317) 232-8172 or (800) 988-7901
ctap@idem.in.gov

For purposes of [IC 4-22-2-28.1](#), the Small Business Ombudsman designated by [IC 4-4-35-8](#) is:

Erik Scheub
Office of Small Business and Entrepreneurship
One North Capitol, Suite 600
Indianapolis, IN 46204
(317) 232-5679
ombudsman@osbe.in.gov

Resources available to regulated entities through the small business ombudsman include the ombudsman's duties stated in [IC 4-4-35-8](#), specifically [IC 4-4-35-8\(9\)](#), investigating and attempting to resolve any matter regarding compliance by a small business with a law, rule, or policy administered by a state agency, either as a party to a proceeding or as a mediator.

The Small Business Assistance Program Ombudsman is:

Steven N. Howell
IDEM Small Business Assistance Program Ombudsman
IGCN 1301
100 North Senate Avenue
Indianapolis, IN 46204-2251
(317) 232-8587 or (800) 451-6027

snhowell@idem.in.gov

Public Participation and Work Group Information

No work group is planned for the rulemaking. If you feel that a work group or other informal discussion on the rule is appropriate, please contact Lauren Aguilar, Rules Development Branch, Office of Legal Counsel at (317) 234-8559 or (800) 451-6027 (in Indiana).

REQUEST FOR PUBLIC COMMENTS

At this time, IDEM solicits the following:

- (1) The submission of alternative ways to achieve the purpose of the rule.
- (2) The submission of suggestions for the development of draft rule language.

Comments may be submitted in one of the following ways:

- (1) By mail or common carrier to the following address:

LSA Document #14-254 Restrictive Covenants
Lauren Aguilar
Rules Development Branch
Office of Legal Counsel
Indiana Department of Environmental Management
Indiana Government Center North
100 North Senate Avenue
Indianapolis, IN 46204-2251

- (2) By facsimile to (317) 233-5970. Please confirm the timely receipt of your faxed comments by calling the Rules Development Branch at (317) 233-8903.

- (3) By electronic mail to laguilar@idem.in.gov. To confirm timely delivery of submitted comments, please request a document receipt when sending the electronic mail. **PLEASE NOTE: Electronic mail comments will NOT be considered part of the official written comment period unless they are sent to the address indicated in this notice.**

- (4) Hand delivered to the receptionist on duty at the thirteenth floor reception desk, Office of Legal Counsel, Indiana Government Center North, 100 North Senate Avenue, Indianapolis, Indiana.

Regardless of the delivery method used, to properly identify each comment with the rulemaking action it is intended to address, each comment document must clearly specify the LSA document number of the rulemaking.

COMMENT PERIOD DEADLINE

All comments must be postmarked, faxed, or time stamped not later than August 15, 2014. Hand-delivered comments must be delivered to the appropriate office by 4:45 p.m. on the above-listed deadline date.

Additional information regarding this action may be obtained from Lauren Aguilar, Rules Development Branch, Office of Legal Counsel (317) 234-8559 or (800) 451-6027 (in Indiana).

Nancy King, Chief
Rules Development Branch
Office of Legal Counsel

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An [html](#) version of this document.